

Governor's Family Violence Council Firearm Surrender Task Force



Law Enforcement Instructional Guide – 2009 Update *Failure to Surrender Firearms – Temporary and Final Protective Orders* October 2009

This instructional guide is presented in a question-and-answer format by the Firearm Surrender Task Force. It is an update, based on laws passed during the 2009 legislative session, to the original guide issued October 2004. The task force was re-formed by the Governor's Family Violence Council to provide law enforcement agencies in particular with information that will help them in the enforcement of significant changes in the law concerning Final and Temporary Protective Orders.

1. How has the protective order law changed?

Effective October 1, 2009, all respondents subject to a Final Protective Order are required to (1) refrain from possessing all firearms, and (2) surrender all firearms in their possession to a law enforcement agency. The judge has no discretion; he/she is required to order the surrender of all firearms. Previously, the surrender provision applied only in Final Protective Orders where a judge, using his/her discretion, had ordered the respondent to surrender them. On October 1, 2009, the surrender provision will automatically apply to ALL Final Protective Orders. In fact, the box ordering surrender will be pre-checked.

Similarly, a judge may now order the surrender of all firearms, under certain circumstances, by a respondent to a Temporary Protective Order. With Temporary Protective Orders, such an order by a judge is discretionary, not mandatory as it is for Final Protective Orders.

These firearms provisions and other amendments to the Family Law Article (FL) will go into effect October 1, 2009, as follows:

- a. The final protective order shall order the respondent to surrender to law enforcement authorities any firearm in the respondent's possession, and to refrain from possession of any firearm, for the duration of the protective order. (FL, §4-506 (E)) **Change: The judge is now REQUIRED to order surrender in Final Protective Orders and the respondent shall not possess any firearm.**
- b. Judges under certain circumstances may order a respondent to a Temporary Protective Order "to surrender to law enforcement authorities any firearm in the respondent's possession, and to refrain from possession of any firearm, for the duration of the temporary protective order..." (FL, §4-505 (a) (2) (viii)) The judge may order the surrender of all firearms if the abuse consisted of: (1) the use of or threat to use a firearm by the respondent against the petitioner, or (2) serious bodily harm or threat to cause serious bodily harm to the petitioner by the respondent. **Change: The surrender and refrain provisions now may extend to Temporary Protective Orders; they previously applied only to Final Protective Orders.**
- c. The judge may extend the duration of a temporary protective order as needed, but not to exceed 6 months, to effectuate service of the order where necessary to provide protection or for other good cause. (FL, §4-505 (c) (2)) **Change: The new six-month time period was previously 30 days.**
- d. A Final Protective Order, under certain circumstances, may be effective for up to 2 years. (FL, §4-506 (b) (2) (iii)) **Change: Previously, unless a 6-month extension was requested and granted by the court, the court had no authority to extend the terms of an order beyond 1 year.**

(Question #1, continued)

- e. District Court Commissioners or judges may order a law enforcement officer to use reasonable and necessary force to return a minor child to the custodial parent after service of an Interim or Temporary Protective Order. (FL, §4-504.1 (D) and FL, §4-505 (a) (3)) **Change: Previously, this “reasonable and necessary force” provision applied only to Final Protective Orders.** See attached 84 Opinions of the Attorney General 105 (1999) concerning the use of reasonable and necessary force.
- f. On January 1, 2010, contingent on Maryland’s receipt of federal funding, the Department of Public Safety and Correctional Services shall notify a petitioner, who so requests, of service of an Interim or Temporary Protective Order within one hour after a law enforcement officer electronically notifies DPSCS of service, and of service of a Final Protective Order within one hour after knowledge of service of the order on the respondent (FL, §4-504(D)). A law enforcement officer shall, within two hours after service of an Interim or Temporary Protective Order on the respondent, electronically notify DPSCS of the service (FL, §4-504.1(f) (3) and (FL, §4-505(b) (1) (II)). **Change: Notification of DPSCS by a law enforcement officer and of a petitioner by DPSCS is new.**

2. **Would you clarify exactly what FL, § 4-509 (b) means when it says that “An officer shall arrest with or without a warrant and take into custody a person who the officer has probable cause to believe is in violation of an interim, temporary, or final protective order in effect at the time of the violation”?**

It means that an officer is **required** to effect a custodial arrest, whether or not the violation occurs in the officer’s presence or view, if the officer has probable cause to believe that an arrestable condition of any type of protective order has been violated.

Arrestable conditions are those that order the respondent to:

- a. Refrain from abusing or threatening the petitioner,
- b. Refrain from contacting or harassing the petitioner,
- c. Refrain from entering the petitioner’s residence,
- d. Vacate the residence,
- e. Stay away from the petitioner’s or other family members’ place of employment, school, or temporary residence, and
- f. Surrender any firearms in his/her possession and refrain from possessing any firearm.

You have no discretion about whether or not to arrest a respondent if one of the above conditions is violated. You must arrest, whether the condition is violated in your presence while you are on the scene and the respondent is present, or a violation is called to your attention as having occurred (for example - several days before) and you have probable cause to believe that the violation did occur as alleged, so long as the violation occurred while the order was in effect.

All the above conditions, except the firearm surrender provision, are contained in each of the three types of protective orders: Interim, Temporary, and Final. The firearm surrender provision applies only to Temporary Protective Orders, under certain circumstances where a judge may order surrender, and to Final Protective Orders where the judge is required to order surrender. Interim Protective Orders do not have a firearm surrender provision, and firearm possession, unless otherwise prohibited by law, is permitted.

3. **What does the term “refrain from possessing” mean?**

It means that the respondent may not be in possession of any firearm. If the respondent possesses any firearm, he/she is in violation of the Family Law Article (statutes quoted in 1-a and 1-b, page 1).

4. Are law enforcement officers exempt from the firearm surrender provisions if they are respondents to a Temporary Protective Order that orders them to surrender firearms or to a Final Protective Order?

No. There are no exceptions whatsoever to the firearm surrender provision. Law enforcement officers, as any other respondent who is ordered to surrender firearms in his/her possession, may not be in possession of any firearm and must surrender firearms in his/her possession, including his/her issued service weapon, when asked to do so by the serving law enforcement agency/officer. In the case of the law enforcement officer's issued service weapon, the firearm should be turned over by the serving agency, after being surrendered by the respondent officer, to the respondent officer's employing agency. The respondent officer may not carry an issued service weapon while on duty. This same guidance holds for retired law enforcement officers who have a legal authorization to carry a firearm; they are not exempt from the firearm surrender provision and may not possess any firearm while they are a respondent to a protective order that orders them to refrain from possessing any firearm.

5. Does the change in the firearm surrender provisions apply to all Final Protective Orders?

Yes.

6. Does the change in the firearm surrender provisions apply to all Temporary Protective Orders?

No. It applies only to those Temporary Protective Orders in which the judge has checked the box (box #7) ordering the respondent to surrender his/her firearms to a law enforcement agency.

7. How will an officer know that a judge has ordered the respondent to surrender his/her firearms?

- a. For a Final Protective Order, box #12 will be checked. As earlier noted, that box will actually be pre-checked, since surrender and refraining from possession is mandatory for all Final Protective Orders.
- b. For a Temporary Protective Order, box #7 will be checked. If the box is not checked, the respondent has not been ordered to surrender firearms.

8. When the Temporary or Final Protective Order requires the respondent to surrender his/her firearms, what firearms exactly does that mean?

It means **ALL firearms** that the respondent possesses, whether or not those firearms were involved in the incident that caused the petitioner to apply for the protective order. A "firearm" is defined as a weapon that expels, is designed to expel, or may readily be converted to expel a projectile by the action of an explosive; or the frame or receiver of such a weapon and includes a starter gun (PS, §5-101 (h) (1 & 2)). The definition includes long guns, such as rifles and shotguns.

9. Are there any firearms a respondent to a Final Protective Order may legally possess under Maryland law?

No.

10. Are there any firearms a respondent to a Temporary Protective Order may legally possess under Maryland law?

The answer depends on whether box #7 on the Temporary Protective Order is checked.

- a. If box #7 on the Temporary Protective Order is checked, the respondent may NOT legally possess any firearms. The respondent is restricted by FL, §4-505 (a) (2) (viii) that directs the respondent to surrender any firearm he/she possesses and to refrain from possessing any firearm.
- b. If box #7 on the Temporary Protective Order is not checked, the respondent is not restricted. The respondent may be in possession of any firearm he/she is legally entitled to possess.

11. At what point after the issuance of a Temporary or Final Protective Order in which a respondent is ordered to surrender his/her firearms must the respondent actually turn over the firearms?

Both the Temporary and Final Protective Order directs the respondent to surrender his/her firearms “immediately.” “Immediately” is not specifically defined but by general definition means that the firearms must be surrendered without delay. However, the element of reasonableness must be considered. In other words, once the order has been issued, the respondent should be given a reasonable amount of time to comply. In practical terms, the respondent must be given a chance to gather the firearms and turn them over to the specified law enforcement agency.

In the case of a Final Protective Order, what will usually happen is that the court will send a copy of the order to the law enforcement agency that is responsible for service and that maintains the protective order file. At that point, these guidelines recommend that agencies adopt the following procedure to facilitate the surrender of firearms:

Once the copy of the Final Protective Order is received by the law enforcement agency, the agency should:

- a. Contact the respondent to arrange for the surrender of his/her firearms;
- b. Although the respondent has already been served with the Final Protective Order, provide the respondent with a copy of the order to ensure that the respondent is aware that he/she must surrender firearms; and
- c. Annotate the “Remarks” field of MILES/NCIC with “firearms surrender ordered”.

If the respondent fails to comply with the arrangement and there is probable cause to believe that the respondent possesses firearms, the agency shall arrest the respondent or, if an arrest is not physically possible because the respondent is not present, should apply for an arrest warrant.

12. When a Temporary Protective Order ordering firearm surrender is being served by a law enforcement officer, how should the surrender provision be carried out?

After serving the order and reading the surrender provision from box #7 to the respondent:

- a. The serving officer should ask the respondent if he/she possesses any firearms.
- b. If the respondent says no, the officer should advise the respondent that:
 - (1) It is illegal to possess any firearm;
 - (2) Any firearms in his/her possession must be surrendered to a law enforcement officer immediately;
 - (3) Failure to surrender is a violation of the law; and
 - (4) The transfer of firearms to another person, with the Temporary Protective Order in effect, is a violation of the law.
- c. If the serving officer is aware that MILES indicates the respondent has registered firearms, or that the petitioner claims the respondent has firearms, and investigation reveals that the respondent does possess firearms, an arrest warrant should be sought. In such cases, these guidelines strongly recommend that application for warrant should be the policy of all law enforcement agencies in the state.
- d. If the respondent acknowledges the possession of firearms, the serving officer should seek their surrender immediately on the scene.
- f. If the officer has determined that there is probable cause to believe the respondent possesses firearms and is refusing to surrender them, the officer shall effect an on-scene arrest and, as part of the investigation, one of the avenues may be to obtain a search warrant for the firearms.

13. Can a respondent surrender his/her firearms to any law enforcement authority?

Box #12 on the Final Protective Order form and box #7 on the Temporary Protective Order have a line on which the judge will enter the specific law enforcement agency to which the respondent shall surrender the firearms. This provision is not new to the Final Protective Order. The judge has a list of agencies in each county and Baltimore City which has the responsibility to serve protective orders. Usually, that is the sheriff's office, but it varies from jurisdiction to jurisdiction. Those agencies are designated as the agencies to which firearms will be surrendered. The judge will usually select from the agency or agencies in the jurisdiction in which the order will be served as to which agency the firearms should to be surrendered. The judge is not bound to the list; he/she may also select an agency that is not listed as the serving agency. Moreover, if the respondent turns the firearms in to an agency other than the designated agency, the receiving agency should not refer the respondent to the designated agency but should accept the firearms. See the following question and answer for a continuation of this discussion.

14. Once a respondent surrenders firearms, what responsibilities does the custodial law enforcement agency have?

FL, §4-506.1 (A) provides that a law enforcement officer shall give the "respondent information on the process for retaking possession of the firearm; and transport and store the firearm in a protective case, if one is available, and in a manner intended to prevent damage to the firearm during the time the protective order is in effect."

Attached is a letter entitled "Temporary or Final Protective Order Notice: Illegal Firearms Possession." It describes to the respondent (1) the requirements of the law (2) the process for surrendering the firearm (3) the process for retaking possession of the firearm and (4) the circumstances that prohibit the respondent from retaking possession. The Courts will provide this letter to the respondent in the service packet. At the time of service or at the time of surrender of the firearm the law enforcement officer should refer the respondent to the contents of the letter and advise the respondent to follow the procedures outlined for retaking possession.

If the respondent requests that the firearms be transported in a protective case and makes one available, the officer shall transport those firearms that fit in the case. Other firearms that do not have a protective case provided by the respondent shall be transported safely and carefully. It is the agency's responsibility to maintain the integrity of stored firearms.

15. Are we supposed to notify anyone that firearms have been surrendered?

There never has been nor is there a centralized notification system; furthermore, the information is not in MILES. As a means to address this deficiency promptly and to have a standardized procedure, these guidelines recommend the following procedure and the attached form use:

1. Judges will have a list of those law enforcement agencies which are serving agencies in the various counties and Baltimore City. This list will represent the agencies which judges will primarily designate as agencies to which respondents will surrender firearms.
2. When a respondent surrenders firearms, the agency will:
 - a. Document in its protective order file that firearms have been surrendered, and
 - b. Prepare, keep a copy of, and submit to the court *a copy of the property inventory sheet or a form similar to the attached model entitled "Schedule of Firearms Surrendered or Seized-Final Protective Order,"* as a means of recording and notifying the court of the surrender of firearms.
3. If firearms are confiscated by or surrendered to an agency other than the one designated in the protective order:
 - a. The receiving agency should take custody of those firearms and immediately notify the agency to whom the firearms were supposed to have been turned in that the firearms have been taken into custody.
 - b. The receiving agency may take steps to transfer the firearms to the designated agency if an arrangement can be mutually agreed upon.
 - c. With information from the original custody agency, the designated agency will carry out

the steps in section 2 above.

16. What checks are available to law enforcement to help us determine what firearms a respondent might possess?

To determine what regulated firearms a respondent may possess, the Maryland Automated Firearms Services System (MAFSS) can be queried through any dispatch center that has access to a MILES terminal. To determine the likelihood of a respondent possessing unregulated firearms, such as rifles and long guns, a search of Department of Natural Resources Hunting Licensees may be useful. These database checks will give officers a good starting point in trying to determine what firearms a person may have. However, computer systems have discrepancies and by themselves cannot be used as probable cause.

17. What are the elements of probable cause to effect an arrest of a respondent who has not surrendered firearms?

The standard of probable cause is the same as for other types of cases. The officer must have a reasonable belief that the respondent possesses firearms and has failed to surrender them within a reasonable time after notification of the protective order. Whether probable cause exists in a particular case will, of course, depend on the specific facts and the totality of the circumstances. Probable cause may be based on (a) facts observed by an officer or (b) information from a reliable source. For example, an officer would have probable cause of a violation of the surrender provision if the officer has personal knowledge that the respondent continued to possess a firearm after service of the order or if the officer receives similar information from a credible source. The reliability of the source may be based on past reliability, corroboration, or specificity of the tip.

18. The new provision specifies that the respondent surrender “any firearm in (his/her) possession” and “refrain from possession.” What exactly does the term “possession” mean?

“Possession” means firearms that the respondent has in his/her control. Control doesn’t only mean firearms that are immediately accessible to the respondent or within his/her easy reach. Certainly, it applies to those circumstances. But it also more broadly applies to firearms in other locations besides the home, over which the respondent has control, for example, he/she maintains firearms at his/her place of business. If the respondent is residing in another location in which the owner has firearms, the question that must be answered is whether the respondent has access to those firearms or whether the owner maintains reasonable control over them. This latter situation about residing in another location with firearms belonging to the owner of the location should be discussed with a prosecutor or the agency’s legal advisor if time permits.

19. What should we do when there is no probable cause to believe that the respondent possesses firearms or it becomes evident that the respondent does not possess firearms and the order requires surrender?

In these types of situations, there is no probable cause to believe that there is a violation and therefore arrest is not authorized. The court may be notified of the law enforcement agency’s determination, but there is no requirement to modify the protective order. It is best that the surrender order remain in place in the event new information reveals that the respondent does possess firearms or comes in possession of firearms during the course of the protective order. The protective order can only be violated if there is probable cause to believe that the respondent has possession of firearms which he/she has failed to surrender.

20. What should we do if the victim claims the respondent has not turned in any firearms (or has kept some of them) and they are in the home and accessible to the victim?

A law enforcement officer could respond to the location with the petitioner and, if the petitioner has the legal authority to consent to a search of the location, seize the firearms. The officer shall then arrest the respondent or, if an arrest is not physically possible because the respondent is not present, the officer should apply for an arrest warrant.

21. **What should we do if the victim claims the respondent has not turned in any firearms (or has kept some of them) and they are in the home but not accessible to the victim, or they are in another location?**

The law enforcement officer would have to determine whether the respondent had turned in any firearms and then conduct an investigation to determine whether there is probable cause to believe that the respondent has not complied with the order. This investigation could include a search warrant for the home or other location if the statement of the petitioner is credible and/or there is other information that establishes probable cause. If it is determined that the respondent has not complied, the officer shall arrest the respondent or, if an arrest is not physically possible because the respondent is not present, the officer should apply for an arrest warrant.

22. **Does the respondent's failure to surrender firearms mean that the designated law enforcement agency shall file for an arrest warrant?**

If there is probable cause to believe that the respondent possesses firearms, and a reasonable amount of time has passed that would enable a respondent to "immediately" surrender his/her firearms, a law enforcement officer shall arrest the respondent or, if an arrest is not physically possible because the respondent is not present, the officer should apply for an arrest warrant.

23. **Does the respondent's failure to actually turn over firearms to a designated law enforcement agency also mean that the agency shall file for a search warrant?**

If there is probable cause to believe that the respondent possesses firearms in a particular location, such as the residence or another specified location, and the agency does not receive consent to retrieve the firearms, as part of its investigative procedure, the law enforcement agency may apply for a search warrant.

24. **Is it necessary to have firearms present in order to effect an arrest?**

No, but see Question #25.

25. **What will be the standards for prosecution?**

As in other criminal cases, the prosecution must prove the charge beyond a reasonable doubt. While charges may be supported by a single witness' statement that the defendant failed to surrender a firearm in violation of the order, it will be helpful to have independent evidence of possession of the firearm. Corroboration of such testimony by other witnesses or evidence will be extremely helpful. Recovery of the firearm itself through the execution of search warrant or other permissible search will be helpful in securing a conviction.

26. **How can we better assure that arrest warrant applications will be approved?**

In substantiating why an arrest warrant should be issued, officers should articulate that FL § 4-509 (b) authorizes arrest in lieu of a summons and may also articulate any of the following applicable factors from Maryland Rules, Rule 4-212:

- The defendant has previously failed to respond to a summons that has been personally served or a citation;
- There is a substantial likelihood that the defendant will not respond to a summons;
- The whereabouts of the defendant are unknown and the issuance of a warrant is necessary to subject the defendant to the jurisdiction of the court;
- The defendant is in custody for another offense; or
- There is probable cause to believe that the defendant poses a danger to another person or the community.

27. **After the Final Protective Order has expired (or a Temporary Protective Order has expired and a Final Protective Order has not been issued to replace it) is the custodial law enforcement agency required to return the firearms to the respondent?**

Yes, if the respondent seeks to retake possession and is eligible to do so. FL, §4-506.1(B) provides that the respondent may "retake possession of the firearms at the expiration of" a Temporary or Final Protective Order, unless the respondent is ordered to surrender the firearm in a Final Protective Order, the Final Protective Order is extended, or the respondent is not otherwise legally entitled to own or possess the firearm.

28. After the Temporary or Final Protective Order has expired, is the custodial agency required to notify the respondent to respond to retrieve his/her firearms?

Except for the notification for retaking possession given to the respondent at the time of surrender, there is no specific requirement in the surrender provision to notify the respondent *further*. Agencies should follow their standard property procedures.

Attachments:

- 84 Opinions of the Attorney General 105 (1999) (*Question #1*)
 - *Temporary or Final Protective Order Notice: Illegal Firearms Possession (Question #14)*
 - Schedule of Firearms Surrendered or Seized–Final Protective Order (*Question #15*)
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Notes:

Guide for Training, Not a Substitute for Legal Advice

This guide is intended as a training tool and offers some procedural recommendations. It is not intended to substitute for the advice of legal counsel. Please use due care and consult state and local laws, legal advisor, State's Attorney, and agency policy and procedure.

Firearm Surrender Task Force

This guide was developed by the Governor's Family Violence Council Firearm Surrender Task Force, a group comprised of representatives from the Governor's Office, Governor's Office of Crime Control & Prevention, Governor's Family Violence Council, Office of Attorney General, Administrative Office of the Courts, United States Attorney's Office, State's Attorney's Office for Baltimore City, Maryland State Police, Maryland Police and Correctional Training Commissions, Maryland Network Against Domestic Violence, Mid-Shore Council on Family Violence, Maryland Association of Domestic Violence Officers, Maryland Chiefs of Police Association, Maryland Sheriffs' Association, Anne Arundel County Police Department, Baltimore County Police Department, Carroll County Sheriff's Office, and Prince George's County Sheriff's Office.

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Endorsement

The Maryland Police and Correctional Training Commissions has endorsed this guide.

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